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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 LAUSTEVEION DELANO JOHNSON,
9

10 *Petitioner,*

11 vs.

12 DWIGHT NEVEN, *et al.*,

13 *Respondents.*
14

2:08-cv-01363-JCM-RJJ

ORDER

15 This represented habeas matter under 28 U.S.C. § 2254 comes before the court on
16 respondents' (#64) to dismiss. Respondents contend that the petition, as amended, must be
17 dismissed because none of the claims therein are exhausted. The overarching issue
18 presented is whether any of the proceedings filed in the state courts fairly presented and
19 exhausted any claims.

20 ***Background***

21 Petitioner Lausteveion Johnson challenges his Nevada state conviction, pursuant to
22 a guilty plea, of sexual assault and attempted sexual assault with the use of a deadly weapon.
23 Petitioner's judgment of conviction was filed on July 15, 2004. Petitioner did not file a direct
24 appeal.¹

25 On or about May 12, 2005, Johnson mailed an original petition for an extraordinary writ
26 to the state supreme court clerk for filing. The state supreme court denied the petition, in the
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28 ¹#59, Ex. 21.

1 manner discussed further *infra*, on August 24, 2005. The court thereafter denied Johnson's
2 petition for rehearing, and the notice in lieu of remittitur issued on November 16, 2005.²

3 On or about November 21, 2007, petitioner mailed a motion to correct, reduce or set
4 aside an illegal sentence to the state district court clerk for filing. The state district court
5 denied the motion on December 27, 2007, and petitioner mailed a notice of appeal for filing
6 within thirty days of the order, on January 8, 2008. The notice of appeal was on a federal
7 form, although petitioner wrote in "Clark County," and the notice ostensibly sought to appeal
8 to the "United States Court of Appeals for the Ninth Circuit" from a judgment and sentence
9 imposed "by the District Court for the State of Nevada" on or about July 4, 2004. It appears
10 that both the state district court and the state supreme court construed the notice of appeal
11 liberally as a timely appeal from the December 27, 2007, state district court order denying the
12 motion to correct sentence. The state supreme court affirmed, in the manner discussed
13 further, *infra*, on July 16, 2008. The remittitur issued on August 12, 2008.³

14 Meanwhile, on or about January 8, 2008, petitioner mailed a second motion to correct,
15 reduce or set aside an illegal sentence to the state district court clerk for filing. The state
16 district court denied the second motion on February 6, 2008. Petitioner did not file a notice
17 of appeal as to the denial of the second motion to correct sentence, at any time.⁴

18 Over seven months later, on or about September 18, 2008, petitioner mailed a notice
19 of appeal for filing. This notice of appeal was on a state court form. However, petitioner
20 sought to appeal thereby from a December 11, 2007, order denying a motion to correct
21 sentence, which lined up with the date that the state district court heard argument on and
22 stated that it would deny the *first* motion to correct sentence. The state supreme court treated
23 this notice of appeal, based on the description of the order being appealed, as an appeal from
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25 ²#59, Exhs. 26, 28, 30, 31 & 32.

26 ³#60, Exhs. 42, 45, 47, 57 & 58. The online docket record of the state supreme court confirms that
27 Ex. 47 herein was filed as the precipitating notice of appeal for an appeal from the denial of the motion to
correct sentence.

28 ⁴#60, Exhs 48 & 51.

1 the December 27, 2007, order denying the first motion to correct sentence. The state
2 supreme court dismissed the untimely appeal for lack of jurisdiction on December 30, 2008.⁵

3 Meanwhile, on or about May 29, 2008, petitioner mailed a state post-conviction petition
4 to the state district court clerk for filing. The state district court denied the petition, and the
5 notice of entry of decision was filed on September 9, 2008. Petitioner did not file a notice of
6 appeal from the denial of the petition within the thirty-day time period for doing so.⁶

7 On or about October 2, 2008, petitioner mailed the federal petition to the clerk of this
8 court for filing. The court granted petitioner's motion for appointment of counsel on January
9 16, 2009, with the notice of appearance by the assistant federal public defender taking the
10 representation being filed on February 19, 2009.⁷

11 Over three years later, on March 13, 2012, petitioner, via an appearance in the state
12 district court by the federal public defender, filed a notice of appeal in the state district court.
13 The notice of appeal sought to appeal the state district court order noticed on September 9,
14 2008, denying the state court post-conviction petition. Following a show cause order and
15 response thereto, the state supreme court dismissed the untimely appeal for lack of
16 jurisdiction on May 9, 2012.⁸

17 In sum, petitioner filed: (a) an original petition for an extraordinary writ in the state
18 supreme court; (b) a first motion to correct sentence with an appeal construed as a timely
19 appeal; (c) a second motion to correct sentence with no appeal; and (d) a state post-
20 conviction petition with an, extremely, untimely appeal.

21 ***Governing Law***

22 Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust state court
23 remedies on a claim before presenting that claim to the federal courts. To satisfy this
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25 ⁵#60, Exhs. 61 & 62; see also *id.*, Ex. 44.

26 ⁶#60, Exhs. 54, 59 & 60.

27 ⁷## 1, 7 & 11.

28 ⁸#60, Ex. 67; #63, Exhs. 71-73.

1 exhaustion requirement, the claim must have been fairly presented to the state courts
2 completely through to the highest court available, in this case the state supreme court. *E.g.*,
3 *Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003)(*en banc*); *Vang v. Nevada*, 329
4 F.3d 1069, 1075 (9th Cir. 2003). In the state courts, the petitioner must refer to the specific
5 federal constitutional guarantee and must also state the facts that entitle the petitioner to relief
6 on the federal constitutional claim. *E.g.*, *Shumway v. Payne*, 223 F.3d 983, 987 (9th Cir.
7 2000). That is, fair presentation requires that the petitioner present the state courts with both
8 the operative facts and the federal legal theory upon which the claim is based. *E.g.*, *Castillo*
9 *v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005). The exhaustion requirement insures that
10 the state courts, as a matter of federal-state comity, will have the first opportunity to pass
11 upon and correct alleged violations of federal constitutional guarantees. *See, e.g.*, *Coleman*
12 *v. Thompson*, 501 U.S. 722, 731 (1991).

13 ***Discussion***

14 The court often addresses exhaustion issues in a claim-by-claim order directed to the
15 claims in the petition, as amended, in order. As noted at the outset, however, the overarching
16 question in this case is whether any of the state proceedings exhausted any claims in the first
17 instance. For the reasons discussed below, the court concludes that none of the state court
18 proceedings exhausted any claims relevant to the instant matter. The court accordingly
19 discusses the exhaustion issues below on a proceeding-by-proceeding basis, *i.e.*, addressing
20 whether each particular state proceeding fairly presented and exhausted any federal claims.

21 ***Original Petition for an Extraordinary Writ***

22 Presenting a claim in a procedural context in which the merits of the claim will not be
23 considered, or will be considered only in special circumstances, does not constitute fair
24 presentation of the claim for purposes of exhaustion. *E.g.*, *Castille v. Peoples*, 489 U.S. 346,
25 351 (1989).

26 A long line of well-established authority thus holds that a claim is not fairly presented
27 and is not exhausted when a petitioner fails to present the claim in state district court under
28 available state post-conviction procedures but instead presents the claim in an original

1 petition to the state's high court seeking to invoke an extraordinary discretionary jurisdiction
 2 that only rarely if ever is exercised. See, e.g., *Pitchess v. Davis*, 421 U.S. 482, 488 (1975);
 3 *Ex parte Hawk*, 321 U.S. 114, 116 (1944); *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir.
 4 1994); *Sweet v. Cupp*, 640 F.2d 233, 238 (9th Cir. 1981). Accord *Lindquist v. Gardner*, 770
 5 F.2d 876 (9th Cir. 1985).

6 However, in *Chambers v. McDaniel*, 549 F.3d 1191 (9th Cir. 2008), the court of appeals
 7 held that the language used by the Nevada state supreme court in rejecting the original
 8 petition in that case did not unambiguously reflect that the disposition was on procedural
 9 grounds rather than on the merits.

10 In *Chambers*, the state supreme court had issued a December 3, 2003, order denying
 11 an extraordinary writ petition on the following grounds:

12 This is a proper petition for an extraordinary writ.
 13 Petitioner challenges the validity of his judgment of
 14 conviction and sentence. We have considered the petition
 15 on file herein, and we are not satisfied that this court's
 intervention by way of extraordinary relief is warranted at
 this time. Accordingly, we

16 Order the petition DENIED.[FN1]

17 [FN1] We have considered all proper
 18 person documents filed or received in this
 matter, and we conclude that the relief
 requested is not warranted.

19 See 549 F.3d at 1196; see also *id.* at 1195 (date of order).

20 *Chambers* held that the use of the foregoing language constituted a disposition in the
 21 merits, *i.e.*, not an unambiguous disposition instead on a procedural ground, thereby
 22 exhausting the claims in the original petition. 549 F.3d at 1196-99. The court of appeals held
 23 that the state supreme court's order constituted a disposition on the merits because the state
 24 supreme court stated in the body of the order that "[w]e have considered the petition on file
 25 herein, and we are not satisfied that this court's intervention by way of extraordinary relief is
 26 warranted at this time." In addition, the state supreme court had stated in the footnote that
 27 "[w]e have considered all proper person documents filed or received in this matter, and we
 28 conclude that the relief requested is not warranted." 549 F.3d at 1195-99.

1 In the present case, the state supreme court's August 24, 2005, order instead stated:

2 This is a proper person petition for extraordinary
3 relief. Citing to Article 6, Section 4 of the Nevada
4 Consitution, petitioner challenges the validity of his
5 judgment of conviction and requests this court to consider
6 his claims on the merits.

7 This court has held that it "*will not exercise its*
8 *original jurisdiction to consider* a writ petition in a criminal
9 case raising claims that could or should have been raised
10 in an appeal or in an appropriate post-conviction
11 proceeding in the district court." [FN1] We have reviewed
12 the documents before this court, *and we decline to*
13 *exercise this court's original jurisdiction in this matter.*
14 Petitioner may raise his claims in a post-conviction petition
15 for a writ of habeas corpus filed in the district court. [FN2]
16 Petitioner may appeal to this court from a final, adverse
17 decision. [FN3] Accordingly, we

18 Order the petition DENIED. [FN4]

19 [FN1] *Hosier v. State*, 121 Nev. ___, ___,
20 P.3d ___, ___ (Adv. Op. No. 41, August
21 11, 2005).

22 [FN2] See NRS 34.724(2)(b); NRS
23 34.738(1). We express no opinion as to
24 whether petitioner could satisfy the
25 procedural requirements of NRS chapter 34.

26 [FN3] NRS 34.575(1).

27 [FN4] We have *received* all proper
28 person documents submitted in this matter,
and we conclude that no relief is warranted
for the reason set forth above. We
caution petitioner that a prisoner may forfeit
all deductions of time earned by the prisoner
if the court finds that the prisoner has filed a
document in a civil action and the document
contains a claim or defense included for an
improper purpose, the document contains a
claim or defense not supported by existing
law or a reasonable argument for a change
in existing law, or the document contains
allegations or information presented as fact
for which evidentiary support is not available
or is not likely to be discovered after further
investigation. See NRS 209.451(1)(d);
Hosier, 121 Nev. at ___, A petition for
a writ of habeas corpus is a civil action for
purposes of this statute. NRS 209.451(5).

#59, Ex. 28 (*italic emphasis added*).

1 The state supreme court thus used language in denying Johnson's petition that the
 2 court of appeals in *Chambers* found, in contrast to the order reviewed in that case, "clearly
 3 and unambiguously den[ied] a petition for an extraordinary writ on procedural grounds." As
 4 the *Chambers* panel explained:

5
 6 Finally, the language used by the Nevada Supreme Court
 7 in other cases involving petitions for extraordinary writs is
 8 illuminating. In *Hosier v. State*, 121 Nev. 409, 117 P.3d 212, 213
 9 (2005)(per curiam), a decision filed two years after *Chambers*'
 10 petition for an extraordinary writ was denied, the Nevada
 11 Supreme Court held that "[a]lthough this court retains original
 12 jurisdiction to issue writs, this court will not exercise its original
 13 jurisdiction to consider a writ petition in a criminal case raising
 14 claims that could or should have been raised in an appeal or in an
 appropriate post-conviction proceeding in the district court." The
 court then concludes: "we decline to exercise this court's original
 jurisdiction to consider this original petition challenging the validity
 of the judgment of conviction." *Id.* What is clear from *Hosier* is
 that the Nevada Supreme Court is capable of clearly and
 unambiguously denying a petition for an extraordinary writ on
 procedural grounds and that, when it does so, the court will state
 that it "declin[e]s to exercise its original jurisdiction to consider"
 the petition.

15 549 F.3d at 1198.

16 In the present case, as in *Hosier*, the state supreme court expressly declared that "we
 17 decline to exercise this court's original jurisdiction in this matter." Indeed, the court cited to
 18 *Hosier* as its supporting authority for not doing so, citing *Hosier* for the proposition that the
 19 state supreme court "*will not exercise its original jurisdiction to consider* a writ petition in a
 20 criminal case raising claims that could or should have been raised in an appeal or in an
 21 appropriate post-conviction proceeding in the district court."

22 Accordingly, under nearly seven decades of established jurisprudence, including the
 23 analysis in *Chambers*, the state supreme court "clearly and unambiguously" denied Johnson's
 24 petition for an extraordinary writ on procedural grounds rather than on the merits. The
 25 petition, under well-established law, did not fairly present and exhaust any claims.⁹

26
 27 ⁹The statement in footnote 4 of the state supreme court order reinforces the conclusion that the state
 28 supreme court did not consider the merits. The court stated only that it had "received" the proper person

(continued...)

1 ***First Motion to Correct Sentence***

2 The state supreme court affirmed the denial of Johnson's first motion to correct, reduce
3 or set aside an illegal sentence in pertinent part on the following grounds:

4 In his motion, appellant claimed that the district court
5 improperly imposed the deadly weapon enhancement because in
6 entering his plea he did not admit to facts supporting the deadly
7 weapon enhancement or waive a jury trial on the issue of the
8 deadly weapon enhancement. Appellant further claimed that
consecutive sentences violated double jeopardy. Finally,
appellant claimed that he received ineffective assistance of
counsel and his plea was not entered voluntarily and knowingly.

9 A motion to correct an illegal sentence may only challenge
10 the facial legality of the sentence: either the district court was
without jurisdiction to impose a sentence or the sentence was
11 imposed in excess of the statutory maximum. "A motion to
correct an illegal sentence *'presupposes a valid conviction and*
12 *may not, therefore, be used to challenge alleged errors in*
proceedings that occur prior to the imposition of sentence.'" A
13 motion to modify a sentence "is limited in scope to sentences
based on mistaken assumptions about a defendant's criminal
14 record which work to the defendant's extreme detriment." A
motion to correct or modify a sentence that raises issues outside

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16 ⁹(...continued)

17 documents filed and that it concluded that no relief was warranted "for the reason set forth above." The sole
18 reason stated in the text of the order for not providing relief was that the court declined to exercise its original
jurisdiction in the matter, under the court's well-established rule that it did not exercise its original jurisdiction
19 to consider a writ petition raising claims that could or should have been raised on direct appeal or in a state
post-conviction petition.

20 This court also notes that the state supreme court, as it had done in *Hosier*, cautioned the petitioner
21 as to the prospect of the court imposing sanctions for the filing of such an original petition. This caution that
sanctions could be imposed for such a filing further reinforces the conclusion that the court was not reaching
22 the merits on what the court was suggesting was a potentially sanctionable procedural effort to invoke its
original jurisdiction.

23 Further, as a collateral point, the claims in grounds 1, 2 and 3 in the amended petition that petitioner
24 contends were exhausted by the original petition for an extraordinary writ clearly did not constitute strictly
questions of law that did not potentially require evidentiary and factual determination. They instead were fact-
25 intensive claims challenging the effectiveness of defense counsel, the voluntariness of Johnson's plea, and
his competence at the relevant time. The type of claims involved thus lay at the core of the policy reason
articulated in *Hosier* for the state high court's rule in this regard. *Cf. Chambers*, 549 F.3d at 1199 (discussing
26 application of *Hosier's* rationale where the claim instead was one of *Kazalyn* instruction error). This point is a
collateral one, however, because, regardless of the underlying policy reasons expounded upon in *Hosier* for
27 the state supreme court's rule in this regard, once the state supreme court unambiguously indicates that it
has declined to exercise its original jurisdiction to consider the extraordinary petition, that is the end of the
28 matter. That has been the law since at least the 1944 decision in *Ex parte Hawk*.

1 the very narrow scope of issues permissible may be summarily
2 denied.

3 Our review of the record on appeal reveals that the district
4 court did not err in denying the motion. *Appellant's claims fell*
5 *outside the scope of claims permissible in a motion to correct an*
6 *illegal sentence and a motion to modify a sentence.* Appellant's
7 sentence was facially legal, and appellant failed to demonstrate
8 that the district court was not a competent court of jurisdiction.
9 Appellant failed to demonstrate that his sentence was based
10 upon a mistaken assumption about his criminal record that
11 worked to his extreme detriment. Moreover, as a separate and
12 independent ground to deny relief, appellant's claims *relating to*
13 *the deadly weapon enhancement* were without merit. In entering
14 his guilty plea to attempted sexual assault with the use of a
15 deadly weapon, appellant admitted to the facts supporting the
16 elements of the offense and expressly waived his right to a jury
17 trial; thus, the district court properly imposed the deadly weapon
18 enhancement.[FN6] Therefore, we affirm the order of the district
19 court denying the motion.

20 [FN6] See *Blakely v. Washington*, 542 U.S.
21 296, 303 (2004) (stating that precedent
22 makes it clear that the statutory maximum
23 that may be imposed is "the maximum
24 sentence a judge may impose solely on the
25 basis of the facts reflected in the jury verdict
or admitted by the defendant.") (emphasis in
original).

26 #60, Ex. 57, at 2-3 (italic emphasis added)(state authority citation footnotes omitted).

27 Again, presenting a claim in a procedural context in which the merits of the claim will
28 not be considered, or will be considered only in special circumstances, does not constitute
fair presentation of the claim for purposes of exhaustion. *Castille, supra*.

Here, the state supreme court clearly held that Johnson's claims "fell outside the scope
of claims permissible in a motion to correct an illegal sentence and a motion to modify a
sentence." The court did address the merits of Johnson's *Blakely* claim concerning the
deadly weapon enhancement, which perhaps would have exhausted such a claim.¹⁰
However, the federal amended petition contains no such claim, quite likely because such a

¹⁰ See, e.g., *Chambers*, 549 F.3d at 1196. A state court may consider the merits as a separate and
independent ground without undercutting the application of a state procedural bar. However, alternative
consideration of the merits of an improperly-presented claim will exhaust the claim. The state supreme court
was not applying a state procedural bar to the claims but instead was holding that the claims were not
presented in a proper procedural vehicle.

1 claim plainly is without merit. Claims of ineffective assistance of counsel and of an involuntary
 2 guilty plea fell outside the scope of claims permissible on the motion and therefore were not
 3 fairly presented by inclusion in such a motion.

4 The first motion to correct sentence therefore did not exhaust any claim presented in
 5 the federal amended petition because: (a) the only claim considered on the merits therein,
 6 the *Blakely* claim, is not included in the amended petition; and (b) the claims of ineffective
 7 assistance of counsel and of an involuntary plea in the motion were not properly presented
 8 via that procedural vehicle.¹¹

9 ***Second Motion to Correct Sentence***

10 Petitioner never appealed the state district court denial of the second motion to correct,
 11 reduce or set aside an illegal sentence. To the extent that petitioner intimates otherwise
 12 herein, any such suggestion is refuted by the record. The notice of appeal filed on September
 13 30, 2008, expressly was directed to the December 2007 order denying the *first* motion to
 14 correct sentence, and it was so construed by the state supreme court in dismissing that
 15 particular appeal as untimely.¹² There, again, simply was no notice of appeal ever filed
 16 directed instead to the denial of the *second* motion to correct. It is axiomatic that a claim must
 17 be fairly presented completely through to the state supreme court to be exhausted. *E.g.*,
 18 *Peterson, supra; Vang, supra*. None of the claims in the second motion to correct sentence
 19 ever have been presented to the state supreme court, via any vehicle. None of the claims
 20 therein have been exhausted.¹³

21
 22 ¹¹Petitioner relies on the motions to correct sentence for the exhaustion of claims of ineffective
 23 assistance of counsel and involuntary guilty plea in grounds 1 and 2. See #58, at 11 & 15. This court
 24 expresses no opinion as to the correlation, if any, between the claims in the two state court motions and
 those in the federal amended petition. The motions to correct simply did not exhaust any such claims even if,
arguendo, otherwise correlated. The motions were not a proper procedural vehicle for such claims.

25 ¹²See text and record citations, *supra*, at 2-3.

26 ¹³If the second motion had been appealed and had been resolved in the manner described herein as
 27 to the first motion, then the preceding discussion regarding the first motion then also would have been fully
 applicable to the second motion as well. If, on the other hand, the second motion had been untimely

(continued...)

Untimely Appeal of State Post-Conviction Petition

As outlined in the procedural background, petitioner mailed a state post-conviction petition for filing on or about May 29, 2008, but he did not thereafter appeal the denial of the petition on or about September 9, 2008. He mailed the federal petition for filing on or about October 2, 2008. The court thereafter granted petitioner's motion for appointment of counsel, with the federal public defender entering a notice of appearance on February 19, 2009. Over three years later, on March 13, 2012, petitioner, via an appearance in the state district court by the federal public defender, filed a notice of appeal in the state district court.

As noted in passing in the procedural background, the state supreme court directed petitioner to show cause why the appeal should not be dismissed for lack of jurisdiction. The supreme court referred to prior authority holding that an untimely notice of appeal fails to vest jurisdiction in the court.¹⁴

In response, petitioner, through federal habeas counsel, urged that he had "good cause" for failing to file a timely notice of appeal because of alleged mental illness. He maintained:

Johnson, an incompetent petitioner, was incapable of complying with the procedural requirement in this matter to file a timely notice of appeal. He has no available remedy to achieve review of the merits of the claims in his state habeas petitioner, other than by filing an untimely notice of appeal. Any subsequent habeas petition in the lower state court will result in the application of several procedural bars to these grounds. See NRS 34.726; NRS 34.810; NRS 34.800. Johnson therefore requests that this Court exercise its jurisdiction over this matter and accept the notice of appeal.

#63, Ex. 72, at 3. Petitioner attached over 100 pages of exhibits in support of the show-cause response, although the documents merely were copies of prior filings with no medical evidence directed specifically to the appeal period in and after September 2008.

¹³(...continued)

appealed, then the discussion in the following section regarding untimely appeals would have been applicable here as well. The overriding point, however, is that *petitioner never appealed the denial of the second motion, whether timely or otherwise*. He simply never appealed the denial of the motion.

¹⁴#63, Ex. 71.

1 On May 9, 2012, the state supreme court dismissed the appeal for lack of jurisdiction.
 2 The court stated in pertinent part:

3 In response [to the show-cause order], appellant
 4 suggests that he had good cause to file the notice of appeal more
 5 than three years after notice of entry of the order had been
 6 served. Specifically, he points to his long history of mental illness
 7 and the pretrial finding of incompetence, arguing that he “was
 8 incapable of complying with the procedural requirement in this
 9 matter to file a timely notice of appeal.” Unlike, the procedural
 10 default provisions cited by appellant that apply to post-conviction
 11 habeas petitions, NRS 34.726; NRS 34.800; NRS 34.810, there
 12 are no good cause provisions to excuse the untimely filing of a
 13 notice of appeal, NRS 34.575(1); NRAP 4(b). Cf. *Gonzales v.*
 14 *State*, 118 Nev. 590, 595, 53 P.3d 901, 903 (2002) (“*Unlike the*
strict jurisdictional time limits for filing notice of appeal, the
one-year time limit for filing a post-conviction habeas petition may
be excused by a showing of good cause and prejudice.”). And
 the time to file a notice of appeal cannot be enlarged by this
 court. NRAP 26(b). “The filing of a timely notice of appeal is a
 fundamental jurisdictional requirement; without it, this court never
 obtains jurisdiction over an appeal and *has not power to consider*
 the issues raised. . . .” *Dickerson v. State*, 114 Nev. 1084, 1087,
 967 P.2d 1132, 1134 (1998). Because the notice of appeal was
 not timely filed, *we lack jurisdiction* and therefore

15 ORDER this appeal DISMISSED.

16 #63, Ex. 73, at 1-2 (*italic emphasis added*).

17 Again, as discussed at length herein, in order to exhaust a claim, a habeas petitioner
 18 must fairly present the claim (a) completely through to in this instance the state supreme court
 19 (b) via a procedural vehicle in which the merits of the claim will be considered rather than via
 20 a procedural vehicle in which the merits will be considered at best in only special
 21 circumstances. Johnson’s attempted presentation of claims via a notice of appeal that was
 22 untimely by more than three years, plainly, failed to present claims to the state supreme court
 23 via a procedural vehicle in which the merits of the claims could be considered, much less
 24 would be considered. Presenting claims to a court via a procedural vehicle over which it has
 25 no jurisdiction represents the epitome of a failure to fairly present claims.

26 Petitioner nonetheless urges that the March 2012 untimely appeal – over which the
 27 state supreme court had no jurisdiction – exhausted claims in the amended petition.
 28 Petitioner recasts the dismissal of the untimely appeal instead as the “purported invocation

1 of a procedural bar” and maintains that the dismissal of the years-late untimely appeal “[a]t
2 most, presents an issue of procedural default.” He maintains that he has no remaining
3 recourse in the state courts because his claims would be procedurally barred in a state post-
4 conviction petition. Yet he nonetheless maintains that he can overcome any such procedural
5 default on federal review because, *inter alia*, he can show cause and prejudice,
6 notwithstanding the fact that the Nevada state courts apply substantially the same standards
7 as do the federal courts in determining whether to disregard a procedural bar.¹⁵

8 The court acknowledges the creativity of habeas counsel, but the filing of the untimely
9 appeal in truth does not add anything of substance to the exhaustion analysis in this case.
10 If, as discussed below, petitioner *arguendo* indeed has no remaining recourse in the state
11 courts via a state post-conviction petition due to procedural bars, then he did not need to file
12 a patently untimely appeal over which the state supreme court had no jurisdiction for his
13 claims to be exhausted. If, on the other hand, petitioner can present the same cause-and-
14 prejudice arguments to the state courts in a state post-conviction petition that he now
15 maintains that the federal courts should find meritorious, then he may not simply bypass that
16 potentially viable procedure to instead pursue his claims in an untimely appeal over which the
17 state supreme court clearly did not have jurisdiction. To allow a petitioner to “exhaust” a claim
18 by bringing a proceeding over which the state court has no jurisdiction, rather than “coming
19 in through the front door” in a state post-conviction proceeding where his cause-and-prejudice
20 arguments may be considered, would stand the exhaustion doctrine – and the comity and
21 federalism concerns that inform that doctrine – on its head. The years-late untimely appeal
22 plainly did not provide the state supreme court with a realistic opportunity to consider either
23 the merits of the claims or the potential application of state procedural bars because the court
24 simply had no jurisdiction to consider any such issues. Again, if petitioner had no other
25 available procedure to pursue the claims, then it would be that fact, and not the filing of a
26 plainly non-viable untimely appeal, that would render the claims exhausted.

27
28 ¹⁵#65, at 2-6 & n.2.

1 This distinction is critical because the Nevada state courts apply substantially the same
2 standards for avoiding procedural bars to a state post-conviction petition as do the federal
3 courts. Under Nevada state practice, “[a] petitioner can overcome the bar to an untimely or
4 successive petition by showing good cause and prejudice.” *E.g., Mitchell v. State*, 149 P.3d
5 33, 36 (Nev. 2006). In *Robinson v. Ignacio*, 360 F.3d 1044 (9th Cir. 2004), the court of
6 appeals recognized that “Nevada’s ‘cause and prejudice’ analysis and the federal ‘cause and
7 prejudice analysis’ are nearly identical, as both require ‘cause for the default and actual
8 prejudice as a result.’” 360 F.3d at 1052 n.3. Moreover, the Nevada state courts also
9 recognize the same exception for a fundamental miscarriage of justice, such that “[e]ven
10 when a petitioner cannot show good cause sufficient to overcome the bars to an untimely or
11 successive petition, habeas relief may still be granted if the petitioner can demonstrate that
12 ‘a constitutional violation has probably resulted in the conviction of one who is actually
13 innocent.’” *Mitchell*, 149 P.3d at 36 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

14 This court therefore has held, in numerous prior cases, that it will not find a claim
15 exhausted based upon the claim being procedurally barred in the state courts absent
16 unequivocal stipulations: (1) that the petitioner cannot avoid dismissal of the claim in the state
17 courts because he cannot demonstrate cause and prejudice in the state courts to overcome
18 the state procedural bars; (2) that petitioner cannot avoid dismissal of the claim in the state
19 courts because he cannot demonstrate that the alleged constitutional violation has probably
20 resulted in the conviction of one who is actually innocent; and (3) that the procedural bars
21 otherwise are now consistently applied by the Nevada state courts, such that it is not possible
22 that the state courts, as a discretionary matter, would consider the claim despite the
23 procedural default and despite a failure to demonstrate either cause and prejudice or actual
24 innocence. In the absence of such concessions, the court has declined to hold that there is
25 no possibility that unexhausted claims would be considered by the Nevada state courts.

26 Petitioner has made no such concessions here. He instead urges that he can establish
27 cause and prejudice because he was denied counsel in his prior state court proceedings and
28 further because he was subjected to the alleged external impediment of a “renegade” inmate

1 law clerk who either was not reined in or could not be reined in by state correctional officials.
2 If petitioner can make these arguments in federal court, he can present them as well in state
3 court through an available state process where such arguments will be considered. He plainly
4 did not exhaust his claims by instead opting to pursue, through counsel, a procedure – an
5 untimely appeal – over which it was abundantly clear that the state supreme had no
6 jurisdiction to consider either his claims or his cause-and-prejudice arguments.

7 Petitioner relies upon the decision in *Maples v. Thomas*, 132 S.Ct. 912 (2012), but
8 *Maples* is entirely consistent with the analysis herein. In *Maples*, the court held that cause
9 existed for the procedural default of the capital defendant's claims. The court held that cause
10 existed because petitioner's large-firm *pro bono* state post-conviction counsel abandoned him
11 by failing to provide notice of their change of address after leaving the firm, resulting in his
12 failure to timely appeal the denial of his state post-conviction petition. Significantly, the
13 supreme court granted the *certiorari* petition solely as to the procedural default issue, and
14 there was no contested exhaustion issue presented for the court to decide.¹⁶ Even more
15 significantly, the court of appeals did not hold that the claims were exhausted either on the
16 ground that an untimely post-conviction appeal fairly presented claims for consideration on
17 the merits in Alabama or on the ground that the rejection of such an appeal constituted a
18 "purported invocation of a procedural bar." The court of appeals instead concluded that
19 "Maples did not properly exhaust [the] claims in state court" but that "because any further
20 attempts by Maples to exhaust those claims in state court would be futile, Maples's
21 *unexhausted* claims are procedurally defaulted." *Maples v. Allen*, 586 F.3d 879, 886 (11th Cir.
22 2009)(emphasis added), *reversed on other grounds, Maples, supra*. Thus, it was the absence
23 of other state corrective process, not the efforts to pursue an untimely appeal, that rendered
24 the claims in *Maples* technically exhausted by procedural default. Neither the court of
25 appeals nor the supreme court held that an untimely appeal exhausts any claims.

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28 ¹⁶Compare 2010 WL 2727329 (*certiorari* petition) with *Maples v. Thomas*, 131 S.Ct. 1718 (2011)
(grant of *certiorari* "limited to Question 2 presented by the petition").

1 Here, the potential for consideration of petitioner's cause-and-prejudice arguments on
2 Nevada state post-conviction review readily distinguishes the present case from the decision
3 of the court of appeals in *Maples* on the exhaustion issue, which was not presented as a
4 contested issue on *certiorari* review.

5 Petitioner's reliance upon *Gonzalez v. McDaniel*, 2005 WL 1994414 (9th Cir., Aug. 5,
6 2005), similarly is misplaced. At the very outset, counsel has violated Ninth Circuit Rule 36-3
7 by citing the case. Ninth Circuit Rule 36-3 states that "[u]npublished dispositions and orders
8 of this Court issued before January 1, 2007 may not be cited to the courts of this circuit,
9 except [in enumerated specific circumstances not present here]." *Gonzalez* was issued
10 before January 1, 2007, and the order therefore may not be cited to a court within the circuit.
11 In any event, the unpublished – and thus by definition non-precedential – terse decision in
12 *Gonzalez* concluded that there was no other state remedy available without any explicit
13 discussion of the substantial similarity between the state and federal standards for
14 overcoming a procedural default. The unpublished decision did not explicitly take into
15 account the published – and thus precedential – decision in *Robinson* recognizing that the
16 Nevada state and federal standards for overcoming a procedural default are nearly identical.
17 Moreover, the Ninth Circuit followed substantially the same analysis as this court has followed
18 herein in *Jones v. McDaniel*, 2009 WL 890915 (9th Cir., Apr. 2, 2009), holding that the
19 petitioner had not established futility of exhaustion given the substantial similarity of Nevada
20 state and federal standards to overcome a procedural bar. The 2009 decision in *Jones*, while
21 unpublished, properly may be cited under Rule 36-3 as persuasive authority.

22 The court accordingly holds that the years-late untimely state court appeal did not fairly
23 present and exhaust any claims. The court further holds that petitioner has not persuasively
24 established that he may not pursue the same cause-and-prejudice arguments that he seeks
25 to pursue here in this court instead in a state post-conviction petition.

26 Petitioner accordingly has failed to demonstrate that any of the four state proceedings
27 relied upon herein fairly presented and exhausted any of the claims in the federal petition, as
28 amended. Under established law, when the federal petition is wholly unexhausted, the matter

1 must be dismissed immediately for lack of exhaustion. *See, e.g., Rasberry v. Garcia*, 448 F.3d
2 1150 (9th Cir. 2006); *Jiminez v. Rice*, 276 F.3d 478, 481 (9th Cir.2001). The petition therefore
3 will be dismissed without prejudice for lack of exhaustion.

4 ***Consideration of Possible Issuance of a Certificate of Appealability***

5 Under Rule 11 of the Rules Governing Section 2254 Cases, the district court must
6 issue or deny a certificate of appealability when it enters a final order adverse to the
7 petitioner. As to claims rejected on procedural grounds, the petitioner must show: (1) that
8 jurists of reason would find it debatable whether the petition stated a valid claim of a denial
9 of a constitutional right; and (2) that jurists of reason would find it debatable whether the
10 district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484
11 (2000). While both showings must be made to obtain a certificate of appealability, "a court
12 may find that it can dispose of the application in a fair and prompt manner if it proceeds first
13 to resolve the issue whose answer is more apparent from the record and arguments." 529
14 U.S. at 485. Where a plain procedural bar is properly invoked, an appeal is not warranted.
15 529 U.S. at 484.

16 For the reasons discussed herein, jurists of reason would not find the dismissal of the
17 wholly unexhausted petition without prejudice for lack of exhaustion to be debatable or wrong.

18 None of the four state court proceedings relied upon exhausted any claim in the federal
19 petition, as amended.

20 The original petition for an extraordinary writ did not fairly present any claims, under
21 established law spanning back nearly seven decades, including the more recent decision in
22 *Chambers v. McDaniel*, 549 F.3d 1191 (9th Cir. 2008). *See text, supra*, at 1-2 & 4-7.

23 The first motion to correct sentence did not fairly present any claims given the limited
24 scope of such a motion under state practice, with the sole exception of a claim that is not
25 included in the federal petition as amended. *See text, supra*, at 2 & 8-10.

26 The second motion to correct sentence did not fairly present any claims for the simple
27 reason that the denial of the motion never was appealed to the state supreme court. *See*
28 *text, supra*, at 2 & 10.

1 The years-late untimely appeal from the denial of the state post-conviction petition did
2 not fairly present any claims to the state supreme court because the state supreme court does
3 not have jurisdiction to consider the merits of such an untimely appeal. Petitioner further has
4 failed to demonstrate that there is no other available state court process in which he may
5 pursue his claims and cause-and-prejudice arguments, given the substantial similarity
6 between the federal and Nevada state standards for overcoming the potential procedural
7 default of a claim. See text, *supra*, at 3 & 11-17.


8 A certificate of appealability therefore will be denied.

9 IT THEREFORE IS ORDERED that respondents' motion (#64) to dismiss is GRANTED
10 and that the petition shall be DISMISSED without prejudice as completely unexhausted.

11 IT FURTHER IS ORDERED that a certificate of appealability is DENIED. See text,
12 *supra*, at 17-18, and discussion referenced therein.

13 The clerk of court shall enter final judgment accordingly, in favor of respondents and
14 against petitioner, dismissing this action without prejudice.

15 DATED: July 26, 2012.

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19 JAMES C. MAHAN
20 United States District Judge
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